1989

Connie Lee Roberts f/k/a/ Connie Lee Donithorne v. Dennis DuWayne Donithorne : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CONNIE LEE ROBERTS f/k/a CONNIE LEE DONITHORNE Plaintiff-Respondent vs. DENNIS DuWAYNE DONITHORNE Defendant-Appellant	Case No. 890347-CA Category No. 7

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE BOYD L. PARK.

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JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations matter pursuant to U.C.A. Section 78-2a-3(2)(g).

NATURE OF PROCEEDING

This is an appeal from an Order and Judgement of the Fourth Judicial District Court, Judge Boyd L. Park presiding, in which 1) the Court included a provision that the Appellant not harass the Respondent when telephoning the minor children, 2) Appellant was ordered by the lower court not to participate in any of the special activities of the parties children, and 3) ordered Appellant to pay Respondent's attorney's fees.

STATEMENT OF THE ISSUES ON APPEAL

I(A). Did the trial court err when it failed to make any findings of fact or conclusions of law relative to the issue of including a provision that Appellant's not harass Respondent when telephoning the minor children?

(B). Given the facts known to the trial court, did the trial court err when it included in its order a provision that Appellant's not harass Respondent when telephoning the minor children?

II(A). Did the trial court err when it failed to make any findings of fact or conclusions of law relative to the issue of restricting Appellant from participating in any of the children's special activities?

(B). Given the facts known to the trial court, did the trial court err when it restricted Appellant from participating in any of the children's special activities?

III(A). Did the trial court err when it failed to make any findings of fact or conclusions of law relative to the issue of Appellant paying Respondent's attorney's fees?

(B). Given the facts known to the trial court, did the trial court err when it ordered Appellant to pay Respondent's attorney's fees?

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final Order and Judgement entered after a trial in the Fourth District Court, Judge Boyd L. Park presiding, in which the lower court 1) included a provision in its order that Appellant not harass Respondent when telephoning the parties minor children, 2) ordered that Appellant not participate in the special activities of the minor children, and 3) ordered Appellant to pay Respondent's attorney fees.

B. Course of Proceedings.

A Judgment of Dissolution of Marriage was originally issued by the Superior Court of California in the County of Contra Costa on April 15, 1986 and custody of the minor children awarded to Respondent. Respondent filed a Petition to Reduce Foreign Decree to Judgment in January, 1988 in the Fourth District Court of the State of Utah and Appellant filed there an Answer and a Counter Claim in February, 1988 alleging a substantial change of circumstances and that custody be awarded to him. Appellant filed an Order to Show Cause for a specific visitation schedule in September, 1988 and moved to Utah in October, 1988. Respondent filed an Amended Petition to Reduce Foreign Decree to Judgment in December, 1988 through new counsel.

A pre-trial hearing was held on April 29, 1988 on the issue of jurisdiction. A trial was held on February 7, 1989 on the issues of Respondent's Amended Petition and Appellant's Motion for a specific visitation schedule.

C. Lower Court Disposition.

At the pre-trial hearing the court found it had jurisdiction over the issues of custody and visitation but deferred to California the issues of child support and alimony.

At trial on February 7, 1989 the court found jurisdiction to award ongoing child support. On the 29th of April, 1989, the trial court entered an Order and Judgment in which it ruled that,

> The Defendant is entitled to telephone visitation with the minor children which conversation shall not exceed 15 minutes and there shall be no harassment of the Plaintiff.
>
> ...
>
> The Plaintiff is to advise the Defendant as to any special activities that the children are involved in but he is not to participate in those activities but has the right to observe them.
>
> ...
>
> Plaintiff is granted judgment against the Defendant in the sum of $1,800.00 representing a reasonable attorney's fee incurred in this matter.

///

Defendant was ordered to pay to Plaintiff the sum of $293.00 per month as ongoing child support based on the Child Support Guidelines and Defendant's request for extended visitation was reserved by the court pending his showing evidence to the court of a compatible work schedule.

No Findings of Fact or Conclusions of Law were prepared pursuant to this Decision. This appeal ensued on the orders quoted above.

D. Statement of Facts.

The parties in this matter were married on December 30, 1976. Two children, Ryan Tully Donithorne, born July 28, 1980, and Jason David Donithorne, born November 8, 1982, were born as issue of this marriage. The parties separated in April, 1985. A judgment of dissolution of marriage was entered on April 15, 1986 by the Superior Court of California in the County of Contra Costa and custody of the minor children awarded to Respondent.

Respondent secretly relocated with the children to Utah in May of 1985, one month following their separation and prior to even any temporary order of custody being granted her. Subsequent to the parties separation Appellant was refused any visitation with the children by Respondent, except during a brief afternoon while Respondent and the children returned to California for a meeting with Contra Costa County mediation personnel. Such visitation was

only permitted under the supervision of Respondent and her sister-in-law, Becky Roberts, who traveled from Utah with her.

The judgment of dissolution entered on April 15, 1986, provided Appellant the right of reasonable visitation and specifically included four weeks during the summer of 1986 and one-half of Christmas vacation, Thanksgiving and spring break during odd years to Appellant. Notwithstanding said order, Respondent refused to allow Appellant any visitation whatsoever for a period of approximately three years. The first opportunity Appellant was next given to visit the children was during his four day stay in Utah as ordered by Judge Boyd L. Park at pre-trial hearing on April 29, 1988.

During the numerous approximate weekly attempts by Appellant to speak with the children by telephone during the previous three years Respondent refused to allow Appellant to speak with the children more than once per month. To overcome this problem, Judge Park specifically ordered at the pre-trial hearing that Appellant have unlimited telephone contact with the children. No provision that there be no harassment of Respondent when Appellant telephoned the children was included in the pre-trial order.

For the first time since the parties separation, Appellant enjoyed visitation with the children under the same pre-trial order for a period of six weeks with the children the following summer.

Due to Appellants desire to spend more time with his children on a regular basis and be actively involved in their lives as he had been prior to the parties separation, he elected to relocate to Pleasant Grove, Utah in October, 1988. A hearing on Appellant's Order to Show Cause was convened on October 20, 1988 on his motion for extended visitation during the regular days and times Respondent was working during the evening. Domestic relations commissioner, Howard Maetani, restricted Appellant's telephone contact with the children to once per week. Appellant objected to the commissioner's recommendation and Judge Park reinstated Appellants desire for as much as daily telephone contact with the children at trial on February 7, 1989.

SUMMARY OF ARGUMENTS

ARGUMENT

POINT I -- THE TRIAL COURT ERRED WHEN IT DID NOT MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW UPON WHICH TO BASE ITS RULING THAT INCLUDED AN UNNECESSARY PROVISION THAT THERE BE NO HARASSMENT OF PLAINTIFF WHEN DEFENDANT TELEPHONES THE MINOR CHILDREN AND FURTHER ERRED IN ISSUING ITS RULING CONTAINING SUCH PROVISION.

The heart and core of Appellant's appeal, and his central concern, is that the trial court failed wholely to make any findings of fact or conclusions of law whatsoever which evidence the thought and reasoning process of the trial court.

Underlying the Appellant's position is this notion: A person has a **right to know** the process by which the court considered the evidence and formed conclusions from the evidence. It is the function of the trial court to make findings of fact to reveal the court's thought process. A litigant has the "right to know" the process by which the court considered the evidence and the points of law and formed its conclusions based thereon.

On this point the Utah Supreme Court ruled in Christiansen v. Christiansen, 667 P.2d 592 in citing Chandler v. West, 610 P.2d 1299, 1301 (Utah, 1980) as follows:

> The making of formal findings of fact and conclusions of law, whether the motion is granted or denied, materially assists the parties in determining whether there may be a basis for appeal, and if an appeal is taken, significantly assists this court in its review.

On this same point the Utah Supreme Court later ruled in Pennington b. Pennington, 711 P.2d 254 (Utah, 1985),

> We acknowledge that the findings are meager, and strongly advise respondent's attorney, who drafted them, to take the necessary effort in the future to prepare more specific and substantive findings. We cannot overemphasize the importance of well written findings to support modifications of divorce decrees. See Tuckey v. Tuckey, Utah, 649 P.2d 88 (1982). "One of the reasons for this requirement is to explain the basis for the modification so the aggrieved party can determine whether to challenge it and so the appellate court

> can properly review it on appeal." Shioji v. Shioji, Utah, 671 P.2d 135, 136 (1983). Conclusory findings give little indication of the trial court's reasons for reaching its result. Such findings may invite unnecessary expensive appeals which in turn delay final resolution of the issues and impede judicial economy.

In the case of Acton v. J.B. Deliran, 58 Utah Adv. Rep. 8, 9 (Utah, 1987), the Utah Supreme Court repeated the principles under which a trial court's findings of fact are deemed sufficient. In Acton, the court ruled,

> The findings of fact must show that the court's judgment or decree `follows logically from and is supported by, the evidence.' The findings `should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" (Citing Smith v. Smith, at 426 and Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah, 1979).

> We do not mean that the trial court was incorrect, but only that the issues are for the trial court to decide and that the findings of fact must reveal how the court resolved each material issue.... Acton at 9

In Acton, the Court concluded that the finding therein had been inadequate and that the case should be remanded for entry of proper findings.

In Smith, it was held by the Utah Supreme Court that the findings of fact rendered by the trial court,

> [Did] not pass muster since they simply [did] not demonstrate a rational factual basis for the ultimate decision by reference to pertinent factors that relate to the best interest of the child, including specific attributes of the parents. Smith, at 426. (Emphasis added.)

Rule 52(a) of the Utah Rules of Civil Procedure states that

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon,...It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence.

Nevertheless, in this case the trial court made no finding of facts or conclusions of law either in its written order or in its oral statements concerning the evidence presented relative to the necessity of the court including a provision in its order that there be no harassment of Plaintiff when Defendant telephones the minor children.

The record is void of any proof whatsoever that Defendant has ever harassed Plaintiff in any way, notwithstanding her allegations to that effect contained in her initial Petition.

Defendant categorically denied in Paragraph 7 of his Answer to Plaintiff's initial Petition that any such harassment had ever occurred. Defendant further provided evidence in Paragraphs 2 & 3 of his Affirmative Defenses portion of his Answer that said allegations are sham pleas.

Subsequently Defendant filed a counter-claim to Plaintiff's petition, wherein he again addressed the issue of telephone harassment. In Paragraph 20 of his First Claim regarding interference with visitation and in Paragraph 8 of his Second Claim regarding a substantial change of circumstances

warranting the change of custody, Defendant further supported his denial of harassment.

Notwithstanding Defendant's categorical denial of making harassing phone calls Plaintiff reiterated such allegations in Paragraph 9 of her Amended Petition filed by new counsel. In addition, Plaintiff again falsely alleged that Defendant had molested her in the same paragraph, yet provided no evidence at trial of such concoction on her part.

POINT II -- THE TRIAL COURT ERRED WHEN IT DID NOT MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW UPON WHICH TO BASE ITS RULING THAT APPELLANT IS NOT TO PARTICIPATE IN HIS CHILDREN'S SPECIAL ACTIVITIES AND FURTHER ERRED IN ISSUING SUCH RULING.

All of the above arguments relative to the importance of the trial court making findings of fact and conclusions of law apply equally to this second issue.

The record is silent as to any justification for restricting Appellant from participating in his children's special activities. Further, the trial court's order that Appellant is permitted to attend but not participate in his children's special activities is impractical. When he has gone to such activities he has been approached by others in attendance to engage in conversation and

participation which is difficult to refuse unless he is to be esteemed as anti-social. To justify seemingly anti-social behavior he would be forced to refer to the order precluding such participation obtained by Respondent, which he would prefer not to do lest it be interpreted as publicly disparaging the character of Respondent.

POINT III -- THE TRIAL COURT ERRED WHEN IT DID NOT MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW UPON WHICH TO BASE ITS RULING THAT APPELLANT IS TO PAY RESPONDENT'S ATTORNEY'S FEES AND FURTHER ERRED IN ISSUING ITS RULING THAT APPELLANT PAY THE SAME.

All of the arguments under Point I relative to the importance of the trial court making findings of fact and conclusions of law apply equally to this third issue.

In Asper v. Asper, 81 Utah Adv. Rep. 43 (5/4/88) the Utah Court of Appeals remanded the case to the trial court to make a specific finding of need before an award of attorney's fees could be determined, where the plaintiff wife sought an award of attorney's fees.

Plaintiff did not show that her attorney's fees are reasonable. In Beals v. Beals, 682 P.2d 862 (Utah 1984), the Supreme Court of Utah ruled,

> In divorce cases, awards of attorney's fees must be supported by evidence which shows that the requested award is reasonable.

In rendering its decision to reverse an award of attorney's fees in Beals, the court quoted its earlier decision in Kerr v. Kerr, 610 P.2d 1380 (Utah, 1980) saying that, "Relevant factors of reasonableness include `the necessity of the number of hours dedicated'."

Plaintiff's counsel, failed to proffer at trial evidence of any kind as to "the necessity of the number of hours dedicated."

Further, at no time during trial did Plaintiff allege that she was in financial need of her attorney's fees being awarded. The trial record is completely devoid of testimony by Plaintiff that she had inadequate resources to pay her own attorney's fees.

In Beals (supra), the Utah Supreme Court also said,

> "...the party requesting the award must show financial need...Where reasonableness of the award or financial need have not been shown, we have reversed awards of attorney's fees."

The same court ruled in Kallas v. Kallas, 614 P.2d 641 (Utah, 1980), that,

> ...a proper determination of whether fees should be awarded and the amount, if any, cannot be made without an examination of the facts...Because there was no presentation of facts establishing defendants financial need accompanying the motion the award was inadequately supported.
>
> The decision of the trial court is reversed, and the case is remanded for reconsideration by the trial court in light of this opinion.

Plaintiff's counsel has demonstrated a lack of the requisite integrity to entitle Plaintiff to attorney's fees.

In Kerr (supra), the court noted that,

> Inasmuch as this case is remanded for further proceedings, we deem it appropriate to make some observations about the method of proof of the value of attorneys' services.
>
> It is neither practical nor productive for the profession or for the public, to present the impression that compensation for a lawyer's services can always be gauged on a scale of dollars per hour. Perhaps this can be done as to many of the perfunctory services a lawyer performs, but his services in other areas may run the gamut of the complexities of the human condition.
>
> . . .
>
> The choice of a lawyer, and the value of his services, may depend upon a number of factors, including his background of learning and experience, his ability, **his integrity** (emphasis added) and his dedication to the causes with which he identifies himself.

Plaintiff's counsel has on two past occasions defrauded the court by purposely and knowingly misrepresenting Plaintiff's financial condition by alleging that she was "working at three job simultaneously," when if fact, he knew or had reason to believe otherwise. The two occasions were, **first,** at an Order to Show Cause hearing brought by Defendant regarding visitation before Commissioner Maetani on October 20, 1988 and **second,** at a hearing held on the Friday after Thanksgiving before Judge Boyd Park regarding visitation.

On both these occasions he testified that Plaintiff was in fact working three jobs simultaneously just to support herself and the children.

The gist of his argument was to influence the court on both occasions not to grant the visitation sought by Defendant under the allegation that Plaintiff was only unavailable to the children during the visitation times sought by Defendant because of her having the work three jobs to support the children. Such a misrepresentation by Plaintiff's counsel was simply a lie and Plaintiff's counsel knew or should have known at the time he made said misrepresentation that it was a lie.

Plaintiff counsel's reputation for being unnecessarily litigious, argumentative when in court, and uncooperative in negotiating settlement supports that the award of attorney's fees be reversed.

In Kerr, (supra) the Utah Supreme Court noted that, "Also to be considered," in deciding an award of attorney's fees, **"is the reputation he [or she] has acquired,..."** (emphasis added).

The reputation of Plaintiff's counsel among his peers supports that he is extremely difficult to work with. He is well known for being unnecessarily litigious, argumentative in court when examining and cross-examining witnesses, and especially uncooperative in making efforts to negotiate settlement of the issues between opposing parties. He rather prides himself regarding his litigation skills of advocacy.

Defendant has repeatedly suggested to Plaintiff's counsel that both parties best interest and those of the children would be best served by an attempt by both sides to negotiate the settlement of the numerous issues on which they are opposed. Plaintiff's counsel has consistently refused to negotiate with Defendant, preferring instead to unnecessarily occupy the court's time to resolve many small matters which likely could have been voluntarily worked out better between the parties to everyone's best interest other than Plaintiff counsel's own financial interest.

The Kerr case further does not support the reasonableness of the necessity of the number of hours Plaintiff's counsel alleges to have dedicated to achieve the results obtained for Plaintiff at trial.

Well in advance of the trial Defendant wrote Plaintiff's counsel and made a proposal for settlement regarding the issues heard at trial on February 7, 1989. Although counsel alleged that he would submit the proposal to Plaintiff, such was not done. Notwithstanding counsel's promise to submit the proposal counsel made no effort whatsoever to respond on behalf of Plaintiff to Defendant's proposal, preferring instead to employ his legal prowess at trial.

Further, when Plaintiff's counsel proffered testimony as to the number of hours he had spent, there was no indication that the 20 hours allegedly spent, were spent specifically on the issues heard at trial that day. In fact,

Defendant rather believes that Plaintiff's counsel simply cited the total number of hours he and supposedly spent on the case to date, as though all the time spent and been relevant to the issues argues that day.

CONCLUSION

Notwithstanding the deference which the Court of Appeals gives to the trial court in family law matters, The Court of Appeals is free, especially where findings of fact and conclusions of law as absent in the trial record, to review questions of law and fact and to make findings of its own. Pennington v. Pennington, 711 P.2d 254, 257 (Utah, 1985).

In Acton, the Court concluded that the findings therein had been inadequate and that the case should be remanded for entry of proper findings.

Wherefore, Appellant seeks that this case be so remanded. In the alternative, Appellant request the Court of Appeals make findings of its own based upon the evidence in the record.

The record sustains that there is no need that there be a provision that Appellant not harass Respondent during telephone conversations with the children.

Further, the record sustains that there is no reason to preclude Appellant from participating in the special activities of the children.

And last the record does not support that Appellant be required to pay Respondent's attorney's fees neither at the trial level or on this appeal. Appellant does not have the financial resources to hire an attorney at either level. He has spent approximately 85 hours in preparing this brief. He has lost the opportunity to be otherwise gainfully employed during the 85 hours he has spent to prepare it. It is certainly appropriate that Respondent bear her own legal costs in responding thereto.

DENNIS DONITHORNE
Appellant, in Pro Se

CERTIFICATE OF MAILING

I hereby certify that I have delivered eight true and accurate copies of the above Appellant's Brief to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah, 84102 and four true and accurate copies to Richard Johnson, Attorney at Law, 1327 South 800 East, Suite 300, Orem Utah, 84058, postage prepaid, this 16th day of October, 1989.

DENNIS DONITHORNE
Appellant, in Pro Se